United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21005

EDWARD McLAIN,

Appellant,

v.

AMERICAN SECURITY AND TRUST COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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APPELLANT'S STATEMENT OF QUESTION PRESENTED

The question is whether the lower Court erred in dismissing the complaint filed by appellant as the nominated executor under a will, on the ground of lack of interest, where the complaint challenged the validity of a codicil which removed him as executor.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellee filed a petition in the District Court for probate of the Will and Codicil of Cathren Pettit Larman Miller, deceased, late a domicilliary of the District of Columbia (J.A. 6-9). Appellant, as the nominated Executor under the Will, filed a complaint contesting the validity of the Codicil (J.A.

9-11), in which appellee is named Executor (J.A. 4, 5). Appellee's motion to dismiss the complaint (J.A. 11, 12) was granted (J.A. 14-16). This appeal is from the order of the Court dismissing the complaint (J.A. 17).

Jurisdiction was conferred upon the Court below by Section 11-522, D. C. Code, as amended, and is conferred upon this Court by Section 1291, Title 28, United States Code.

STATEMENT OF THE CASE

The Last Will and Testament of the testatrix was made March 17, 1961 (J.A. 1-4). By Clause Two thereof she appointed her nephew, Edward McLain, as Executor, and provided that if for any reason he is unable or unwilling to serve, then her niece, Gertrude McLain Biggins, shall be named Executrix (J.A. 1). Under Clauses FOUR and FIVE, she bequeathed sums of $5,000.00 each to five nieces and nephews of her deceased husband, and to seven of her nieces and nephews, including Edward McLain, as therein named. In Clauses SIX and SEVEN, she left bequests to friends and provided by Clause EIGHT for the payment of all taxes, debts, etc. out of funds of the estate. The residue, as set forth in clause NINE, is left in equal shares to the Washington Home for Incurables and the Episcopal Home of the Diocese of Washington (J.A. 2, 3).

Appellee asserted in its petition for probate that testatrix made a Codicil to her Last Will on November 20, 1964 (J.A. 6). The Codicil (J.A. 4, 5) consists of three clauses, under the first of which, sums of $5,000.00 each are bequeathed to the children (ten in all), of the nieces and nephews of the testatrix as therein named. Clause SECOND modified Clause TWO of the Will by appointing the American Security and Trust Company as Executor of her Last Will and Testament. Clause THIRD confirmed, ratified and republished the Last Will and Testament.

On November 20, 1964, appellee was also appointed Conservator of the estate of the decedent by Order of the District Court in Civil Action No. 2469-64 (J.A. 7).

The appellant and his mother, Pauline McLain, joined as plaintiffs in filing a complaint contesting the validity of the Codicil (J.A. 9-11). The grounds asserted were, (1) that decedent lacked testamentary capacity to make a Will on November 20, 1964, as provided by Section 21-1507 of the D. C. Code; (2) that she was not at the time of sound mind and memory or in any respect capable of making a Will; and (3) that the paper writing of November 20, 1964, was obtained and the execution thereof procured from the decedent by coercion and undue influence exercised upon her by one Russel L. Gould (J.A. 10). The two residuary legatees filed answers to the complaint averring that they are without knowledge sufficient to form a belief as to the truth of the allegations of the complaint, but demanding strict proof thereof, if material. The appellee filed a motion to dismiss asserting that complainants lacked standing to bring the action (J.A. 11, 12). After answer in opposition to the motion was filed (J.A. 13), and oral argument (J.A. 17), the Court in a Memorandum opinion granted appellee's motion (J.A. 14-16). Thereafter, on March 16, 1967, an Order was entered dismissing the complaint (J.A. 17).

Only Edward McLain appeals from the Order of dismissal.

STATUTES INVOLVED

The following provision of the D. C. Code, 1961 Edition, as amended, governs the issue raised on this appeal:

> "§ 18-508. Caveat; will not to be probated while issues pending.
>
> "If, prior to or upon the hearing of an application to admit a will to probate, a party in interest files a verified caveat in opposition, setting forth facts in-

consistent with the validity of the will, the will may not be admitted to probate until the issues raised by the caveat are determined, as directed by this chapter."

STATEMENT OF POINTS

The single point is whether appellant, the nominated executor under the will of testatrix, but replaced as executor by a codicil, possessed a sufficient interest under Section 18-508 to challenge the validity of the codicil.

SUMMARY OF ARGUMENT

Appellant, the nominated executor under a Will, challenged the validity of a later Codicil which removed him as executor and named appellee bank in his place. In granting the motion to dismiss appellant's complaint on the ground that he lacked the requisite interest under Section 18-508, the lower Court measured appellant's "interest" solely on a pecuniary basis, holding that the right conferred on appellant under the Will and withdrawn by the Codicil, to serve as executor and to receive commissions for his services, cannot be regarded as making him a party in interest.

To the contrary, on the basis of the holding of this Court in *Webb v. Lohnes*, infra, which presented much the same question as raised here, it was recognized that the named, but not qualified, executor as a representative of the decedent, possessed such interest to caveat, by virtue of his duty to support the will and defend the estate against unfounded claims. The lack of any interest of his own was said not to be a bar, and it was noted that if public policy requires that a legally executed will be probated it requires that a spurious will not be probated. Appellant contends that as champion of the Will, the estate as a whole is affected by his removal as executor under the Codicil he challenged in the Court below.

There is a division among the authorities on this issue as indicated in appellant's argument. While appellant is aligned with the minority view, many well reasoned decisions as therein set forth support the contention which he advocates. Included in the argument also, is a comment from the dissenting opinion in *State ex rel. Hill v. District Court,* infra, wherein it was noted that the position of executor is in some respects similar to that of a public officer and involves trust relationships. After observing that one claiming a public office has such a financial and property interest as entitles him to be heard on the question of which of two persons is entitled thereto, it is said that the "same reasoning applies to one named as executor in a will."

Notes commenting on the *Hill* case, infra, contained in issues of two law journals are reviewed in the argument. It will be seen that the decision in *Hill,* which follows the majority rule, wherein the requisite interest is measured on a pecuniary basis, was also the principle adhered to by the lower Court in dismissing appellant's complaint. It may be observed that both of the law journal notes are critical of the decision in *Hill.* In one of the notes, it is said that the majority rule, as expounded in the *Hill* case, invites fraud, since under such circumstances a codicil is virtually uncontestable, where the beneficiaries, their interests being unaffected, are also ineligible to contest. The second of the two law journal notes points out that the better rule would be to permit an executor contest where no person who has a direct pecuniary interest actively opposes the codicil, and where, except for such a contest by the executor, an inability on the part of any person to contest can be shown.

Finally, appellant contends that his position is fully supported by the reasoning in the *Webb* case and urges this Court to apply such view thereby recognizing that the duty owed by the nominated executor to defend the will constitutes the requisite interest within the meaning of Section 18-508. It is submitted that recognition of such interest in the nominated executor would not be inconsistent with, nor would it impinge upon, the rulings of this Court in

other cases, where an "interest" measured in pecuniary terms has been applied to heirs at law, legatees and surviving spouses, as held in the several cases cited in appellant's argument.

Appellant accordingly submits that the judgment of the lower Court is in error and should be reversed.

ARGUMENT

Where appellant, a nephew of the testatrix, was left a bequest under her Will and was nominated as Executor thereof, but was displaced as Executor by a Codicil, the validity of which was challenged in a complaint filed in the lower Court, it was error for the Court to dismiss the complaint on the ground that appellant lacked the requisite interest under the applicable statute to contest the Codicil.

The sole issue for decision is whether appellant has a sufficient interest within the meaning of Section 18-508 to caveat the Codicil. It may be noted that appellant is not an heir at law of the decedent although he is a nephew of the testatrix and is so described in the Will. Furthermore, the bequest of $5,000.00 made to appellant under the Will is not affected by the Codicil. The latter instrument, however, if valid, removes appellant as executor under the Will.

Appellant contends that the holding of this Court in *Webb v. Lohnes* (1938) 68 App. D.C. 310, 96 F.2d 582, is controlling here and establishes that he has the necessary interest to challenge the validity of the Codicil.

While the *Webb* case did not rule on the precise issue raised here, it was observed that –

> "The question whether an administrator is 'aggrieved' by probate of a will, and can appeal, is much the same as the question whether he has an 'interest' which entitles him to oppose probate in the first place." (Page 311).

In that case, Webb, who had been administrator of the estate, was appealing from a judgment which revoked his letters, admitted a lost Will to probate and appointed another as administrator with the will annexed. The issue before this Court, raised on a motion to dismiss the appeal, was whether Webb, as the ousted administrator, had a sufficient interest to appeal from the judgment. In an extensive review of decisions covering the issues presented in both Webb and the instant case, Webb's position was sustained and the motion to dismiss was denied.

On the question involved here, as to the rights and duties of the named, but not qualified, executor as a representative of the decedent, it was pointed out that he is "under a duty to support the will and defend the estate against unfounded claims. His lack of any interest of his own does not bar his appeal." Reasoning from the cases supporting such a view, this Court went on to state, in the *Webb* case, as follows:

> ". . . As the would-be executor is allowed to appeal in order to support what he believes to be the genuine will of the deceased, the ousted administrator should be allowed to appeal in order to support what he believes to be the genuine intestacy of the deceased, which is, in an extended sense, equally his will. If the executor is the 'champion of the will', the administrator is the champion of intestacy. If 'public policy * * * requires that a legally executed will be probated,' it requires that a spurious will not be probated." (Page 312).

In ruling against appellant, the Court below equated the statutory interest required of a caveator on the basis of the definition set forth in *Angell v. Groff* (1914), 42 App. D.C. 198, as narrowed in the more recent case of *Kimberland v. Kimberland* (1953), 92 U.S. App. D.C. 145, 204 F.2d 38. Under the former holding, to challenge a will, the caveator must have been entitled to a distributive share in the estate, had the testator died intestate. *Kimberland* held this interest to mean a distributive share different from what the cav-

eator would have been entitled, if the will were held valid. It was also pointed out in *Kimberland* that the mere possibility of the appointment of the husband as administrator, if the will were set aside, did not make him a party in interest entitled to file a caveat. The lower Court then concluded on the basis of *Helfrich v. Yockel* (1923), 143 Md. 371, 122 A. 360, 31 A.L.R. 323, that the right conferred on appellant under the Will and withdrawn by the Codicil, to serve as executor, and to receive commissions for his services as such executor, cannot be regarded as making him a party in interest entitling him to challenge the Codicil.

Appellant contends that the requisite "interest" of a caveator as traced through the above cited cases, being measured solely on a monetary basis, ignores the broader and more important elements of protection enunciated in *Webb v. Lohnes*, supra. First of all it may be observed, that in *Webb*, this Court twice referred to *Helfrich*, pages 311 and 312, and in the latter reference, seemingly distinguished it as not relevant, saying that "an executor was not allowed to caveat a codicil which named a different executor, but made no other change in the will." It may be noted, that this same distinction obtains as between *Helfrich* and the instant case, since the Codicil here made other changes in addition to naming a different executor, by bequeathing a total of $50,000.00 to children of nieces and nephews of the testatrix, and in a third clause, by republishing the Will. In the broader sense, however, the interest of appellant derives from the rights and duties conferred under the will and involves an interest of an altogether different nature from that considered in the *Angell v. Groff*, *Kimberland* and *Helfrich* cases. It is submitted that the instant case comes within the purview of this Court's holding in *Webb v. Lohnes*, supra, and is to be distinguished therefor, from the holdings in the three cases mentioned immediately above. Paraphrasing from the *Webb* case, to make the language applicable here, it can be said that the nominated executor is the champion of the will, charged with the duty of seeing that it is probated, and if public policy requires that a legally executed will be

probated, it certainly requires that a spurious codicil not be probated.

The case of *Spriggs v. Stone* (1949), 85 App. D.C. 95, 174 F.2d 671, describes varying types of interest that give an aggrieved party the right to appeal. In treating a question as to whether an executor was aggrieved and thus entitled to appeal, which, as has already been noted, is much the same as the question whether he has an interest entitling him to oppose probate in the first instance, this Court observed that the executor, as a general rule "cannot appeal unless either the estate as a whole is affected, or else his individual interests are affected . . . ." Appellant here submits that he comes within the first of these categories in that the estate as a whole is affected by his removal as executor under the Codicil which he challenged in the Court below.

In referring to the holdings of other jurisdictions, it may be noted that there is a division in the authorities on the issue presented, with the majority rule being contrary to the view urged by appellant in the instant case. However, many well reasoned decisions from several impressive jurisdictions uphold the rule for which appellant contends. Indeed, the great bulk of the cases are reviewed in *Webb v. Lohnes*, supra, except for the relative few decided since the date of that opinion.

In the early case of *In re Riviere's Estate* (1908), 8 Cal. App. 773, 98 P. 46, it was said –

> "When one executes a will and appoints an executor, there is an implied direction by the testator that such person shall take all steps necessary to carry into effect the intent and object of the testator. The confidence reposed in such executor by the testator would be abused and he would prove recreant to his trust did he not, even in the face of contests, diligently endeavor to establish the will and in all respects to carry out the wishes of the testator.* * *." (Page 47).

In re Ronayne's Estate (1951), 103 Cal. App. 2d 852, 230 P.2d 423, it was observed that the statutory provision which is not dissimilar to our Section 18-508, specifies that "[a]ny person interested" may contest a will. The Court concluded that a person named as executor, who is not a beneficiary or an heir of the testator may resist a contest of the will before probate. The more recent case of *In re Costa's Estate* (1961), 191 Cal. App. 2d 515, 12 Cal. Rptr. 920, cited with approval the decisions in *Riviere* and *Ronayne*, concluding that an executor is an interested person within the meaning of the statute, if a contest to the will of which he is executor is filed.

In New York, one of the leading cases on the question at issue is *In re Browning's Will* (1937), 294 N.Y.S. 530, 162 Misc. 244, affirmed with a brief opinion in 274 N.Y. 508, 10 N.E.2d 522. It was held there, that the executor named in the will and first codicil was entitled to file objections to a second codicil under its duty to carry out directions of the testator, regardless of whether its commissions would be affected by the second codicil. In the lower Court opinion, *Matter of Davis' Will*, 182 N.Y. 468, 75 N.E. 530, was cited with approval, the Court noting in regard thereto, that it is the executor's primary and positive duty to see that the estate is administered as called for by the will and that no alleged fraudulent codicil be probated without objection on his part. See also, *In re Wiberg's Will* (1950), 197 Misc. 511, 98 N.Y.S.2d 930, wherein it was pointed out that the right to administer an estate is a sufficient interest to entitle the person in whom it is vested to contest the probate of a will. In reference to these cases, it should be noted that the applicable provisions of the statute, as summarized in *In re Browning's Will*, 10 N.E.2d 522, expressly authorizes an executor to file a caveat. Appellant contends that the conferral on the executor by statute of such a right affords protection to an estate, consistent with that outlined by this Court in *Webb v. Lohnes*, supra.

The case of *In re Murphy's Estate* (1922), 153 Minn. 60, 189 N.W. 413, 414, upholds the view sought by the appellant here. In that decision it was stated –

> ". . . Whatever may be the rule elsewhere, and the authorities are divided * * * it must be deemed as settled in this state that the executors named in a will have such representative interest in the allowance and probate thereof as entitles them to appear as champions of the same in the courts of the state."

Among other cases cited therein was *Burmeister v. Gust* (1912), 117 Minn. 247, 135 N.W. 980. To the same effect are the holdings in *Freasman v. Smith* (1942), 379 Ill. 79, 39 N.E.2d 367, *Marshall's Executor v. Pogue* (1928), 226 Ky. 767, 11 S.W.2d 918, *Cowan v. Beans* (1914), 155 Wisc. 417, 144 N.W. 1129, and *Shirley v. Healds* (1857), 34 N.H. 407.

The issue presented here has been the subject of consideration in several annotations, notably, 31 A.L.R. 326, 58 A.L.R. 1462 and 31 A.L.R.2d 756. The latter, containing a most comprehensive review, examines the right of an executor or administrator to contest the will or codicil of his decedent. Three of the cases adhering to the majority rule that are given prominence in this annotation are, *Helfrich v. Yockel*, supra, *In re O'Brien's Estate* (1942), 13 Washington 2d 581, 126 P.2d 47, and *State ex rel. Hill v. District Court* (1952), 126 Mont. 7, 242 P.2d 850, 31 A.L.R.2d 749. As pointed out earlier, in *Helfrich*, the "interest" required to contest the codicil was measured on a monetary basis, with the prospective commissions that might be received by the executor being excluded from consideration. The *O'Brien* case, which contains a rather extensive review of decisions on both sides of the question raised here, and *Hill*, supra, both follow the principle laid down in *Helfrich*. Threading through all of these cases is the uniform requirement, namely, that the executor, in order to file a caveat, must possess a pecuniary interest in the estate.

Appellant, as noted earlier, urges that the doctrine set forth in *Webb v. Lohnes*, supra, be held applicable to this case. It is submitted that appellant's interest to contest the codicil flows directly from his appointment as executor under the will. In further support of this view, reference is made to the poignant language of Mr. Justice Angstman, in the dissenting opinion of *State ex rel. Hill*, supra, wherein it was stated, as follows:

> "The position of an executor is in some respects similar to that of a public officer. Both are trust relationships. Both are expected to give full value in services for the compensation received, a factor stressed in the *O'Brien* case, * * * as showing lack of pecuniary interest in the estate. But one claiming a public office has such a financial and property interest in the office as entitles him to be heard on the question as to which of two persons is entitled thereto. (Citing authorities). The same reasoning applies to one named as executor in a will." (Page 853).

State ex rel. Hill v. District Court, supra, was reviewed in the then current "Decisions" section of two law reviews. In *38 Virginia Law Review* 810, 811, (1952), after pointing out that *Hill* is in accord with the majority of American jurisdictions, the author observed that the minority rule opposes the narrow construction of "interest" and allows a contest of the subsequent will on the theory that the executor has a right to protect his job, or to defend his title. It then noted that another segment of the minority recognizes a duty owed by the executor to defend the will in which he is named. The note criticized the result reached in *Hill*, terming it unfortunate, in that such a codicil is virtually uncontestable since the beneficiaries, their interests being unaffected, are also ineligible to contest. It concluded by stating –

> "The majority rule invites fraud, as in any situation where a wrongdoer may profit handsomely by his own wrong." (Page 811).

The second of the notes referred to, contained in *27 New York University Law Review* 726 (1952), emphasizes that a codicil which only changes the executor can never be contested in those states which deny to the executor the standing to sue, since, under the prevailing view, the legatees would be denied the right to contest because their direct pecuniary interest would not be adversely affected by the change in executors. After pointing out that such a strict rule of non-contestability permits a wrongdoer to take advantage of his own wrong, it states –

> ". . . The better rule would seem to be to permit an executor contest where no person who does have a direct pecuniary interest actively opposes it, and where, except for such a contest by the executor, absolute inability on the part of any person to contest can be shown." (Page 728).

Finally, appellant in contending that his position is fully supported by the reasoning of *Webb v. Lohnes*, supra, urges that this Court follow the concept which recognizes that the duty owed by the nominated executor to defend the will, constitutes the requisite interest within the meaning of Section 18-508. It is submitted that recognition of such interest in the nominated executor would not be inconsistent with, nor would it impinge upon, the rulings of this Court in other cases, where an "interest" measured in pecuniary terms has been applied to heirs at law, legatees and surviving spouses, as held in *Angell v. Groff*, supra, *Werner v. Frederick* (1937), 68 App. D.C. 158, 94 F.2d 627, *Kimberland v. Kimberland*, supra, and *Rothenberg v. Rothenberg* (1959), 107 U.S. App. D.C. 11, 273 F.2d 825.

CONCLUSION

In view of the foregoing it is respectfully submitted that the judgment of the Court below should be reversed.

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CONTENTS OF JOINT APPENDIX

LAST WILL and TESTAMENT
of
CATHREN PETTIT LARMAN MILLER.

I, *CATHREN PETTIT LARMAN MILLER*, of 3019 Macomb Street, Northwest, City of Washington, District of Columbia, also known as Cathren P. L. Miller, Cathren L. Miller, Mrs. A. Irving Miller, Mrs. Arthur I. Miller, and Mrs. A. I. Miller, being of sound and disposing mind and memory, and mindful of the uncertainties of this life, do hereby Make, Publish and Declare this instrument to be *my Last Will and Testament*, and I hereby revoke and cancel any and all previous Wills and Codicils by me at any time heretofore made.

CLAUSE ONE: I hereby authorize and direct the payment of all my just debts; medical, doctors and hospital expenses; all funeral expenses; which my Executor or Executrix decides are just and proper; and I hereby authorize and empower my Executor or Executrix, as the case may be, to use any money or property of my estate to make such payments.

CLAUSE TWO: I hereby Name, Nominate and Appoint my nephew, *EDWARD McLAIN*, as *Executor* of this my Last Will and Testament. If, for any reason, he is unable or unwilling to serve as my Executor, then, in that event, I hereby Name, Nominate and Appoint my niece, *GERTRUDE McLAIN BIGGINS*, as Executrix of this my Last Will and Testament.

CLAUSE THREE: I hereby authorize, empower and direct my Executor or Executrix, as the case may be, to give, free of cost or charge therefor, all my wearing apparel, jewelry, household furniture, appliances, equipment and effects, not forming a part of my realty, to any person or persons, or to any charitable or religious organization, the Executor or Executrix, deems worthy of such gift or gifts.

I wish and direct that all gifts of money to persons be made free of all taxes.

CLAUSE FOUR: I give and bequeath to the following named nieces and nephews of my deceased husband, A. Irving Miller, the following sums of money; said sums to be paid free of all taxes: to *Margaret Miller Hawley* five thousand dollars, to *Donald Miller* five thousand dollars, to *John Paul Miller* five thousand dollars, and to *Ann Miller Lynham* five thousand dollars; and I give and bequeath to the following of my nieces and nephews the following sums of money to be paid in each case free of all taxes; to *Frank Ebaugh* five thousand dollars, to *Gertrude McLain Biggins* five thousand dollars, to *Edward McLain* five thousand dollars, to *Cathren Ludlum Gould* five thousand dollars, to *Samuel Ludlum* five thousand dollars, to *Robert Ludlum* five thousand dollars, and to *John Ludlum* five thousand dollars. In the event any of the above-named beneficiaries predecease me but leaving issue him or her surviving, then the amount so specified herein for the person predeceasing me is to be divided among his or her children in equal shares. In the event any of the above-named beneficiaries predecease me leaving no issue him or her surviving, then the amount so specified herein for the person predeceasing me is to be given to the surviving spouse, if such there be. In the event that there be no spouse surviving the beneficiaries, as the case may be, then the amount so specified, as the case may be, is hereby cancelled and declared null and void for all purposes.

CLAUSE FIVE: I give and bequeath to *Elizabeth Miller Van Gilder,* the niece of my deceased husband, A. Irving Miller, the sum of five thousand dollars, provided she survives me. In the event Elizabeth Miller Van Gilder predeceases me, then the five thousand dollars is hereby given and bequeathed to her surviving children, share and share alike, provided they survive me. In the event Elizabeth Miller Van Gilder's children predecease me, the gift and bequest of five thousand dollars hereinabove mentioned in

this clause is hereby cancelled and declared null and void for all purposes.

CLAUSE SIX: I give and bequeath the sum of one thousand dollars to my good friend *Madge Blessing,* provided she survives me.

CLAUSE SEVEN: I give and bequeath the sum of five thousand dollars to my good friend *Lillian S. Goodall,* provided she survives me.

CLAUSE EIGHT: All income, estate and inheritance, and all other taxes, whether in the District of Columbia, Federal or State; all realty taxes; and debts and expenses which constitute charges against my estate; all administration costs, expenses and fees; are to be paid at the discretion and judgment of my Executor out of any funds or property of my estate.

CLAUSE NINE: All the rest, residue and remainder of my estate – both real, personal and mixed – of whatsoever nature and kind, and wheresoever situated at the time of my demise, I give devise and bequeath, in two equal shares, to the following named institutions in the District of Columbia; said property herein in this Clause mentioned, to be used by said institutions for charitable purposes and to constitute as to each institution a fund to be designated by each institution as *"The A. Irving and Cathren L. Miller Fund". One equal share* of the above-mentioned property is hereby given, devised and bequeathed to *The Washington Home for Incurables,* located at 3720 Upton Street, Northwest, in the District of Columbia. The *other equal share* of the above mentioned property is hereby given, devised and bequeathed to *the Episcopal Church Home of the Diocese of Washington,* now located at 1515 Thirty-second Street, Northwest, in the District of Columbia.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my Seal, to this my Last Will and Testament on this the 17th day of MARCH 1961.

/s/ Cathren Pettit Larman Miller [Seal]

The foregoing instrument was Signed, Sealed, Published and Declared by *CATHREN PETTIT LARMAN MILLER*, the above-named Testatrix, as and for her Last Will and Testament, in the presence of each of us, who, at her request, in her presence, and in the presence of each other, have hereunto subscribed our names as Witnesses on this the 17th day of MARCH 1961.

Witness: /s/ Kathleen D. Fraze
Address: 3030 Macomb St., N.W.

Witness: /s/ Philip J. Stone
Address: 3023 Macomb St., N.W.

CODICIL TO LAST WILL AND TESTAMENT of CATHREN PETTIT LARMAN MILLER

I, CATHREN PETTIT LARMAN MILLER, formerly residing at 3019 Macomb Street, Northwest, Washington, D. C. and presently residing at 5601 Sonoma Road, Bethesda, Maryland, do hereby make, publish, and declare this to be a codicil to the last will and testament heretofore made, signed, sealed, published, declared and executed by me, and bearing date of March 17, 1961.

First: I give and bequeath the sum of Five Thousand Dollars ($5,000.00) each to the children of my nieces and nephews; that is to say, the children of Samuel Ludlum, Robert Ludlum, Edward McLain, Frank Ebaugh, and Cathren Ludlum Gould, who are living at the time of my death. These gifts are to be paid out of my net estate.

Second: I hereby modify and amend CLAUSE TWO of aforesaid last will and testament so that the said CLAUSE TWO shall read as follows:

I hereby nominate, constitute, and appoint the American Security and Trust Company of Washington, D.C. as Executor of this my last will and testament and I direct that the said American Security and Trust Company not be required to give bond.

Third: I hereby modify and amend my said last will and testament, in accordance with the provisions of this codicil and, as hereby and herein modified, amended and extended, I hereby confirm, ratify, redeclare and republish my said last will and testament.

IN WITNESS WHEREOF, I have, on this *20th* day of *November,* 1964, signed, sealed, published and declared the foregoing instrument as and for a codicil to my last will and testament bearing date of March 17, 1961.

/s/ Cathren Pettit Larman Miller [Seal]

Signed. sealed, published and declared on the 20*th* day of *November,* 1964, By CATHREN PETTIT LARMAN MILLER, the testatrix above named, as and for a codicil to her last will and testament bearing date of March 17, 1961, in our presence, and in the presence of each of us, who, at his request, and in his presence, and in the presence of each other, have, on the day aforesaid, hereunto signed and subscribed our names and addresses, as attesting witnesses.

/s/ Edward W. Youngblood
Washington Clinic
Washington 15, D.C.

/s/ Thomas Sadler
Washington Clinic
Washington, D. C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Holding a Probate Court

In re Estate of	)	
	)	
CATHREN PETTIT	)	Administration
LARMAN MILLER, Deceased	)	No. 117840

Address of Petitioner,
15th & Pennsylvania Avenue, N.W.
Washington, D. C. 20013

PETITION FOR PROBATE OF WILL AND CODICIL THERETO AND LETTERS TESTAMENTARY

The Petition of the American Security and Trust Company respectfully represents:

1. That the American Security and Trust Company is a corporation organized under the laws in force in the District of Columbia and doing business therein.

2. That Cathren Pettit Larman Miller, late an adult citizen of the United States and domiciled in the District of Columbia, died in the District of Columbia on July 23, 1966, leaving a paper in the nature of a Last Will and Testament bearing date the 17th day of March, 1961, and a paper in the nature of a Codicil to Last Will and Testament dated the 20th day of November, 1964, in which this Petitioner is named as Executor, which said will and codicil are now on file in the Office of the Register of Wills for the District of Columbia. That no other paper in the nature of a testamentary disposition of the deceased has yet been found, although search has been made, and this Petitioner believes that the above-mentioned papers dated March 17, 1961, and November 20, 1964, are in fact the Last Will and Testament and Codicil thereto of the said decedent.

3. That the said Cathren Pettit Larman Miller was survived by the following persons who are her only known heirs at law and next of kin and who are all adults:

Pauline L. McLain, 2932 Porter Street, N.W., Washington, D.C., and Gertrude L. Ebaugh, Route 3, Box 425, DeLand, Florida, sisters of the decedent; John C. Ludlum, Morgantown, West Virginia; Robert C. Ludlum, Post Office Box 762, Smith River, California 95567, Samuel L. Ludlum, 1638 Candor Avenue, Norfolk, Virginia, and Cathren L. Gould, 2010 West Second Street, Long Beach, Mississippi, children of Clarissa Ludlum, a deceased sister. The decedent also had a brother, Oscar Larman, who died on May 24, 1962. Said brother was predeceased by his only son, Andrew William Larman, who died without issue. That the decedent was not survived by any spouse, nor by any brothers or sisters or children of any deceased brothers or sisters other than as recited herein.

4. That at the time of her death said decedent was seized of the following real estate located in the District of Columbia:

Lot 863, Square 2082, known as 3019 Macomb Street, N.W., which is assessed for tax purposes at $13,156.00; and Lot 61, Square 2563, known as 2478 Ontario Road, N.W., which is assessed for tax purposes at $8,114.00, both of which properties are unencumbered.

5. On November 20, 1964, this Petitioner was appointed as conservator of the estate of the said decedent by the Civil Division of this Honorable Court in Civil Action No. 2469-64, and this Petitioner believes that all of the personal assets of said decedent are now in its possession as conservator of decedent's estate and are as follows:

Cash in various savings accounts, $110,000.00; cash in conservator's account, $5,500.00; Government bonds of the value approximately $60,000.00; mortgage notes of the value approximately $26,000.00; preferred and common stocks of the value of approximately $225,000.00; tangible

personal property and jewelry of the estimated value of $1,000.00, having a total value of $427,500.00, subject to expenses and court costs of said conservation proceedings.

6. The debts of the decedent, including funeral expenses, Petitioner is informed and believes will not exceed the sum of $3,500.00.

WHEREFORE, the premises considered, your Petitioner prays:

1. That notice by citation or by publication or by both as may be necessary shall issue directed to the above named heirs at law or next of kin.

2. That the said paper bearing date of March 17, 1961, and the Codicil thereto bearing date of November 20, 1964, be admitted to probate and record as the Last Will and Testament and Codicil thereto of Cathren Pettit Larman Miller, deceased.

3. That letters testamentary issue to this Petitioner as Executor named in said Will.

4. And for such other and further relief as the nature of the case may require and to this Honorable Court may seem proper.

AMERICAN SECURITY AND TRUST COMPANY

By

BRAULT, GRAHAM, SCOTT & BRAULT

By

Albert E. Brault
Attorney for Petitioner
1314 19th Street, N.W.
Washington, D. C 20036

DISTRICT OF COLUMBIA, SS:

I, ,of the American Security and Trust Company, being first duly sworn on oath depose and say that I have

read the foregoing Petition for Probate of Will and Codicil thereto and Letters Testamentary by me subscribed and know the contents thereof, that the matters and things stated therein of my own personal knowledge are true and those stated on belief and information I believe to be true.

Subscribed and sworn to before me this day of , 1966.

Notary Public, D. C.

My commission expires:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAULINE McLAIN
2932 Porter Street, N.W.
Washington, D. C.

and

EDWARD McLAIN
Bradford Drive and
Overlook Ave.
Annandale, Virginia

Plaintiffs

vs.

AMERICAN SECURITY AND TRUST COMAPNY
15th and Pennsylvania
Avenue, N.W.
Washington, D. C.

Defendant

Administration No. 117840
(Estate of Cathren Pettit
Larman Miller, Deceased)

COMPLAINT CONTESTING VALIDITY OF CODICIL

1. This action contests the validity of the Codicil of the above-named decedent bearing date the 20th day of Novem-

ber, 1964, and is brought by the following-named persons:

(a) Pauline L. McLain, 2932 Porter Street, N.W., Washington, D. C., sister and heir at law of the above-named decedent;

(b) Edward McLain, Bradford Drive and Overlook Avenue, Brooke-Hill Estates, Annandale, Virginia, the nominated Executor in the Will of the above-named decedent, dated the 17th day of March, 1961.

2. That said contestants have had notice that the paper writings of the above-named decedent, dated March 17, 1961, and November 20, 1964, purporting to be respectively, her Last Will and Testament and Codicil thereto, have been filed in this Court.

3. That the interests of said contestants will be injuriously affected by the allowance of the pretended Codicil of November 20, 1964, or its admission to probate, and they hereby contest the validity of said Codicil, and for that purpose allege as follows:

(a) That the above-named decedent lacked testamentary capacity to make a Will on November 20, 1964, in that, as provided by Section 21-1507, D.C. Code, as amended, she could not have executed a valid contract, by reason of the appointment of a conservator for her pursuant to Order of this Court of November 20, 1964, in cause entitled In re Cathren Pettit Larman Miller, Civil Action No. 2469-64.

(b) That said decedent was not, at the time of making and subscribing or of the acknowledging by her of said paper writing of November 20, 1964, of sound mind and memory or in any respect capable of making a Will.

(c) That the said paper writing of November 20, 1964, purporting to be a Codicil of said decedent was obtained and the execution thereof procured from the decedent by the influence and coercion exercised upon her by one Russel L. Gould.

4. The defendants to this action include the proponent of the Codicil, the heirs at law and next of kin of the deceased, the legatee and devisees named in the Will and Codicil thereto as set forth in the summonses being issued by the Register of Wills in accordance with the provisions of Rule 42 of the Rules for the United States District Court for the District of Columbia.

WHEREFORE, the premises considered, your contestants pray:

(1) That summonses may issue from this Court requiring the parties in interest to answer the complaint and that a guardian ad litem may be appointed to represent the interests of any infants involved herein.

(2) That the said paper writing of November 20, 1964, be refused probate and declared invalid.

(3) And for such other and further relief as to the Court may seem just and proper.

/s/ Pauline L. McLain

/s/ Edward McLain

/s/ Joseph A. Rafferty, Jr.
/s/ Clarence G. Pechacek
Attorneys for Plaintiffs

[Jurat]

MOTION TO DISMISS

COMES NOW the American Security and Trust Company, by its attorneys, and moves this Honorable Court to dismiss the complaint filed herein contesting the validity of the Codicil of Cathren Pettit Larman Miller, deceased, and for its reasons states:

1. The American Security and Trust Company is a corporation under the laws in force in the District of Colum-

bia and doing business therein and files this Motion as the nominated Executor in the Codicil to the Last Will and Testament of Cathren Pettit Larman Miller, deceased, which Codicil is the subject of the Complaint filed herein.

2. The caveators herein allege that they have interests sufficient to entitle them to contest the validity of the said Codicil, asserting that Plaintiff Edward McLain was nominated as Executor in the original Will and that Plaintiff Pauline McLain is a sister and heir at law of the decedent.

3. Your movant respectfully suggests to the Court that neither Plaintiff has sufficient interest in the Codicil to have standing to bring their complaint herein. As to the Plaintiff Pauline McLain the only averment of interest is her relationship to the deceased. Despite the fact that she is an heir at law, she is not a beneficiary under the original Will. Accordingly, she has no interest in the estate that could be affected by a successful litigation of the Codicil. As to the Plaintiff Edward McLain, his only interest in the outcome of this caveat would be reinstatement as Executor since his rights of inheritance are unaffected by the Codicil. Interest in the loss of an Executor's commission, standing alone, is insufficient to entitle one to caveat a later Will or Codicil.

4. And for further reasons, your movant respectfully refers the Court to its Memorandum of Points and Authorities, together with its exhibits, attached hereto and prayed to be read as a part hereof.

THE FOREGOING CONSIDERED, the American Security and Trust Company, as nominated Executor in the Codicil which is the subject of the present caveat, moves that the same be dismissed.

/s/ Albert D. Brault
Attorney for Defendant

ANSWER IN OPPOSITION TO MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

The plaintiffs, Pauline McLain and Edward McLain, submit this Answer in Opposition to the Motion to Dismiss filed herein by the American Security and Trust Company and also move the Court for Summary Judgment in their behalf, and as grounds therefor, state as follows:

1. That the plaintiff Pauline McLain, as heir at law of the decedent, and Edward McLain, as the nominated Executor under the decedent's Will of March 17, 1961, have interests which qualify them under Section 18-508, to file a caveat to the codicil of November 20, 1964.

2. That, as set forth in the attached Memorandum of Points and Authorities, the law applicable to "interest" as construed by the cases cited therein, fully supports the contention of the plaintiffs that the Motion to Dismiss should be overruled.

3. The conservator proceeding for the decedent pending at the time she executed the Codicil of November 20, 1964, disabled her, under Section 21-1507 (then 21-507), from making a valid deed or contract. The attached Memorandum of Points and Authorities, as supported by the annexed Statement of Material Facts, establish as a matter of law that the Codicil is not valid for any purpose as the decedent lacked the requisite testamentary capacity under Section 18-102.

For the foregoing reasons and as more fully set forth in the attached Memorandum of Points and Authorities, it is respectfully submitted that the Motion to Dismiss be overruled as to both plaintiffs and that plaintiffs' Motion for Summary Judgment be granted.

/s/ Joseph A. Rafferty, Jr.
/s/ Clarence G. Pechacek
Attorneys for Plaintiffs

MEMORANDUM

The matter before the court is a motion to dismiss a caveat which attacks the validity of a codicil to the last will of the decedent, Cathren Pettit Larman Miller. The ground of the motion is that the caveators are not parties in interest so as to be entitled to assail the codicil's validity.

A petition for the probate of decedent's will and the codicil thereto was filed by the American Security and Trust Company as the party nominated in the codicil as executor of the will. The caveat proceeding followed, challenging only the codicil.

The caveators are a sister and a nephew of the decedent. The sister is one of decedent's heirs at law, but is not a beneficiary under the will or the codicil. She claims nothing by intestacy, the caveat being directed solely to the codicil. The other caveator – the nephew – is not an heir at law of decedent but under the will he is named as executor and is given a legacy of $5,000. The codicil leaves the legacy intact but names as executor of the will a party other than the nephew.

The only other way in which the codicil changes the will is that legacies of $5,000 each are given by the codicil to children of the decedent's nieces and nephews.

By the District of Columbia Code, §18-508, 1961 Edition, Supplement V, 1966, it is provided:

> If, prior to or upon the hearing of an application to admit a will to probate, *a party in interest* files a verdict caveat in opposition, setting forth facts inconsistent with the validity of the will, the will may not be admitted to probate until the issues raised by the caveat are determined * * *.

In Angell v. Groff, 42 App. D.C. 198, 201, the United States Court of Appeals said,

> The interest which a person must possess to enable him to assail the validity of a will is such that, had the testator died intestate, he would have been entitled to a distributive share in the estate.

However, in the later case of Kimberland v. Kimberland, 92 U.S. App. D.C. 145, 146, the Court said of the language quoted above:

> We take this to mean a distributive share different from what he would be entitled to if the will were held valid.

The Kimberland case throws light on the issues in the instant case. Mrs. Kimberland died and by her will left her entire estate which consisted of personalty to her son. After the son offered the will for probate, the husband of the decedent filed a caveat alleging incapacity of Mrs. Kimberland and also fraud and undue influence of a third person. The son's motion to dismiss the caveat was granted, and the husband appealed. The appellate court affirmed, holding that the husband under a statutory provision [1] takes the same share of the estate whether the will is or is not sustained, and that the mere possibility of the appointment of the husband as administrator, if the will were set aside, does *not* make him "a party in interest" entitled to file a caveat.

In the case here, if no codicil had been executed, and the nephew had qualified and acted as executor under the will, the commissions received by him, not as beneficiary, but as executor, would have been paid to him for the services rendered by him as such executor, but as he is now relieved by the codicil of the duties he would have performed had he acted as executor, he receives no commission.

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[1] This provision is now §19-113, District of Columbia Code, 1961 Edition, Supplement V, 1966.

The right conferred upon the nephew by the will, and withdrawn from him by the codicil, to serve as executor and to receive commissions for his services as executor when rendered by him, cannot be regarded as making him "a party in interest" so as to entitle him to caveat the codicil. Helfrich v. Yockel, 143 Md. 371 (1923).

As noted, the remaining caveator in the instant case is a sister of the decedent. She is also the mother of the other caveator. If the codicil were set aside, her claim upon the estate would be no different from what it would be if the codicil were sustained. Whether the codicil stands or falls, she would not be affected. To particularize: If the codicil should be sustained, she would take nothing as it makes no provision for her. If the codicil should be rejected, she still would take nothing as the will makes no provision for her, and she is not challenging the will's validity.

The estate of a decedent should not be subjected to the trouble and expense of an attack on a testamentary writing except by one who, if the attack prove successful, would have some claim upon the estate different from what such person would have if the attack prove unsuccessful. Werner v. Frederick, 68 App. D.C. 158, 161. As previously indicated, Mrs. McLain as caveator does not claim by intestacy, is not opposing the probate of the will, and would receive nothing if the codicil should be sustained and nothing if it should be rejected. It necessarily follows that she has no standing here to caveat the codicil.

The motion of the American Security and Trust Company to dismiss the caveat will be granted. An appropriate proposed order should be submitted by the attorney for the American Security and Trust Company.

/s/ Burnita Shelton Matthews
Judge

March 8, 1967.

ORDER

The above matter having come before the Court on the motion of the defendant American Security and Trust Company to dismiss the complaint filed herein and after consideration of the motion, the attached memorandum of points and authorities, the memorandum in opposition thereto, and oral argument for both sides, it is by the Court this 16th day of March, 1967,

ORDERED, that the motion be and the same is hereby granted, and it is further,

ORDERED, that the complaint filed herein be and the same is hereby dismissed.

/s/ Burnita Shelton Matthews
Judge

[Certificate of Service, 10 Mar. 1967]

NOTICE OF APPEAL

Notice is hereby given this 13th day of April, 1967, that EDWARD McLAIN hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of March, 1967, in favor of the defendant and against said Edward McLain only.

Joseph A. Rafferty, Jr.
Clarence G. Pechacek

Attorneys for Edward McLain

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21005

EDWARD MCLAIN, *Appellant,*

v.

AMERICAN SECURITY AND TRUST COMPANY, *Appellee.*

Appeal from the United States District Court for the District of Columbia

---

ALBERT D. BRAULT
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Washington, D. C. 20036
Attorneys for Appellee

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

APPELLEE'S STATEMENT OF QUESTION PRESENTED

In the opinion of the Appellee the question is:

Does the nominated executor under a will have the requisite interest to caveate a codicil which removed him as executor and made no other significant change in the will?

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TABLE OF CASES

IN THE

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21005

EDWARD MCLAIN, *Appellant,*

v.

AMERICAN SECURITY AND TRUST COMPANY, *Appellee.*

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

STATUTES INVOLVED

The following provision of the D. C. Code, 1961 Edition, as amended, governs the issue raised on this appeal:

> "§ 18-508. Caveat; will not be probated while issues pending.
>
> "If, prior to or upon the hearing of an application to admit a will to probate, a party in interest files a verified caveat in opposition, setting forth facts inconsistent with the validity of the will, the will may not be admitted to probate until the issues raised by the caveat are determined, as directed by this chapter."

SUMMARY OF ARGUMENT

This honorable Court, in several decisions dating back to *Angell* v. *Groff, infra,* has interpreted the term "interest" as used in Section 18-508 as meaning a pecuniary interest in the estate that would be affected if the caveat were unsuccessful. This seems clearly the law, and since Appellant's pecuniary interest in his aunt's estate will be unaffected by his caveat, he does not have the prerequisite "interest".

The argument of *"Webb* v. *Lohnes"* advanced by Appellant does not apply. That case speaks in terms of the standing of an executor or administrator in a representative capacity where he represents the "interests" of others whose "interests" in the estate qualify under the rule.

The "public policy" argument of the Appellant is equally inapplicable for a variety of reasons. The codicil is not uncontestable by any other interested party as he suggests, and even if it were, the rule of preventing a wrongdoer from profiting from his wrong is not involved, since the one who is alleged to have exercised undue influence takes nothing under the codicil.

It is and should continue to be the public policy of this jurisdiction not to permit an estate to be subjected to the expense and delay of a caveat proceeding in a squabble over the executor's commission, unless, perhaps, the succeeding executor is the one who is alleged to have perpetrated a fraud.

ARGUMENT

At issue is whether an executor who has been displaced by a codicil which names a different executor has standing to caveat the codicil on that ground and that ground alone. This involves once again the interpretation of the meaning of the word "interest" as it appears in § 18-508 of the D. C. Code 1961 edition as amended. A brief review of

the history of its prior interpretation is not only helpful but dispositive of the appeal.

The first of this series of cases is *Angell* v. *Groff* (1914), 42 App. D.C. 198. In that case a will was offered for probate and the caveat was instituted. There was but one will, and accordingly, if the caveat were successful, the decedent would be rendered intestate. The Court stated that to caveat the will one would have to be an heir at law, so that in the event the caveat were successful he would have a claim on the estate.

In *Werner* v. *Frederick* (1937), 68 App. D.C. 158, 94 F. 2d 627, there were two wills to be considered, and accordingly the Court broadened the definition of "interest" to include beneficiaries under a former will whose interest would be defeated or changed by a subsequent will. In so doing, the Court explains the reason for the rule in *Angell* v. *Groff* as follows:

> "The reason for requiring an interest to set aside a will to be shown before an attack on a will may proceed is that the estate of a decedent should not be subjected to the trouble and expense of an attack except by one who, if the attack proves successful, would have some legal claim upon the estate."

Lonas v. *Betts* (1947), 82 U.S. App. D.C. 55, looks at the question of a prior will again. In that case an heir at law was the caveator challenging the second will. It was argued, that in view of *Werner,* the heir at law could no longer caveat unless he were named in the prior will. This would seem to follow, since it would only be the beneficiaries of the prior will whose interest would be affected by the subsequent will. However, the Court pointed out that no one was advocating the prior will, and since it had not been offered to probate and no one was claiming under it, the heir could caveat.

It is clear what this Court has meant by the term "interest". If there were any doubt left, it was certainly re-

solved in the case of *Kimberland* v. *Kimberland* (1953), 92 U.S. App. D.C. 145, 204 F. 2d 38. This Court stated:

> "We take this to mean a legal claim upon the estate different from what he would have if the attack upon the will proved unsuccessful."

The rule of Kimberland was reaffirmed in *Rothenberg* v. *Rothenberg* (1959) 107 U.S. App. D.C. 11, 273, F. 2d 825.

This Court has consistently equated the term "interest" with some share in the estate that would be taken if the attack on the will proved successful. Accordingly, the answer to the appeal is clear. Edward McLain does not take any share of the estate following a successful caveat that would differ in any way from the share he takes if the caveat is not successful. He, therefore, has no "interest". The opinion of Judge Matthews clearly, succinctly and correctly states the law and determines this issue.

The "Webb v. Lohnes" Argument Has No Application

For reasons that are not completely clear to the Appellee, the Appellant has laid great stress on the rule of *Webb* v. *Lohnes* (1938), 68 App. D.C. 310, 96 F. 2d 582. The opinion in the *Webb* case clearly indicated that it was not to apply to a situation such as the case at bar. The Court said:

> "Many of the cases cited by Appellee, e.g., Union Savings & Trust Company v. Eddingfield, 1922, 78 Ind. App. 286, 134 N.E. 497, which dismiss appeals by administrators against their removal, involve no controversy over the intestacy or the will of the decedent, but merely the replacement of one administrator by another, pursuant to a statute which entitled relatives of the decedent to priority. Similarly, in Helfrich v. Yockel, 1923, 143 Md. 371, 122 A. 360, 31 A.L.R. 323, an executor was not allowed to caveat a codicil which named a different executor, but made no other change in the will."

Webb does stand for a different rule from that in *Angell, Werner* and *Lonas,* but it is not the rule sought

by the Appellant. *Webb* indicates that the administrator had standing as a *representative* of the heirs at law. The Court referred to this representative capacity of the administrator by calling him the "champion of intestacy". It appears clear that the Court is talking of a representative capacity from the following quotation:

> "In deference partly to their supposed wishes and partly to the supposed interests of society, the law gives to certain persons or institutions a right to intestate succession. To be coherent, the law must provide means for protecting that right. * * * They may not be known, or may not be cited. Cited or not, they may never actually learn of the probate proceedings; or their several interests may be too small and contingent to justify individual caveats on their part. Unless the administrator is permitted to oppose and to appeal from the probate of an alleged will, interests which are theoretically recognized may be unprotected in fact."

In other words, *Angel, Werner* and *Lonas* deal with the "interest" of heirs or beneficiaries in their individual capacity and *Webb* talks about an administrator or executor in his representative capacity.

It is significant to note that the Court in *Webb* would apparently have decided the case differently had the heirs at law been parties to the litigation. In *Webb* no heirs had been found, and accordingly there was no one to maintain the litigation but the administrator. This would appear from the following quotation from the opinion:

> "When heirs are parties to proceedings for the probate of a will, it may be argued with some force, as it was in the *Cairns* and *Avery* cases, *supra,* that they can look out for their own interests."

Thus, it would seem to follow that if the heirs were there, the administrator would not have standing based solely on his commission or his own feelings about the validity of the will of the deceased. It would also seem

to follow that if the heirs were willing to accept the found will, there would be nothing the administrator could do about it. Thus, the administrator's standing in *Webb* would seem to equate itself with the standing of the heirs, measuring that standing by the definition of *Angell, Werner* and *Lonas*. It should be significantly noted that the will changed the distribution of the estate. The Court said:

> "The right of an administrator to appeal from a decision upholding a claim to part of the estate is universally recognized. It would seem that he should be no less entitled to appeal against a claim to an entire estate."

The right, standing, or interest of an executor or an administrator in his representative capacity as discussed in *Webb* presupposes that the rights of the beneficiaries or heirs they represent have been changed and that they are not available to press their own claims.

As mentioned above, the administrator in *Webb* was representing the rights of the heirs, but in the case at bar the Appellant represents only himself. The residuary legatees are parties to this action and were served with process by the Appellant when he filed his complaint. They have appeared and filed their answers. Since these beneficiaries are here to represent themselves, the Appellant does not represent them. As was said in *Webb*:

> "They can look out for their own interests."

The Public Policy Argument Has No Application

In his "uncontestable" argument Appellant presents the proposition that a codicil which makes no change in the will save replacing the executor would be uncontestable if the executor were not given standing to caveat. This is presented as a public policy consideration and suggests that a wrongdoer would thereby profit from his wrong.

This argument is not sound and should not be adopted by this Court for several reasons.

In the first instance, if we were to say that we wanted such a public policy, it is immediately apparent that it would not apply to the case at bar. The reason is that the person alleged to perpetrate the fraud in the instant case does not profit from the codicil. Inherent in Appellant's argument is the added fact that the substituted executor be the one alleged to be guilty of fraud. Since that is not the case here, Appellant's argument falls of its own weight.

Again if we adopt Appellant's proposition, there is another reason that it defeats itself. The residuary legatees under the original will would have standing to caveat the present codicil if they so chose. They are parties to this litigation; they are on notice of the existence of the codicil, of its offer to probate, of its content, and of the present caveat. They choose not to contest. It is evident, therefore, that what Appellant says is not so. There are two other parties who could contest, so that this codicil is not otherwise uncontestable.

Finally, and perhaps most importantly, is that the public policy consideration advocated by Appellant is in collision with the public policy consideration advocated by the Maryland Court of Appeals in *Helfrich* v. *Yockel* (1923), 143 Md. 371, 122 A. 360, 31 A.L.R. 323, and adopted by the majority of jurisdictions that have considered this issue. In *Helfrich,* the executor who was replaced was the attorney who wrote the original will. Recognizing that professionals such as attorneys and those of that category are frequently named executors, that Court states the policy of not permitting a caveat to tie up the estate and the interest of all of the beneficiaries in a squabble over the commission and fees growing out of the probate proceedings. Stripping Appellant's argument of its frills and platitudes, we are involved in the present case as was the Maryland Court in *Helfrich* with a caveat over the right

to earn a commission in handling the estate. This is true to the extent that Appellant is willing to defeat the bequests to his *own children* contained in the codicil in his quest for the commission. The argument of "championing the will" cannot be adopted in this situation because the will remains intact. Accordingly, if we talk policy, we must choose whether we will leave a codicil with only an executorship changed uncontestable, or whether we will open the door to fights over the right to a fee when the rights of the true beneficiaries are not otherwise changed.

There might even be a third alternative that this Court could follow and give effect to both public policies, and we daresay that it is perhaps not an unwise choice. That would be to adopt the *Helfrich* rule and say that under ordinary circumstances where only an executorship is changed, the ousted executor has no "interest" except where his proposed caveat alleges fraud or undue influence on the part of the substituted executor. If such a rule were followed, we would not tie up the estate and burden it with the expense of a caveat that would diminish the value of the estate to the beneficiaries in unnecessary and unwarranted litigation expense in a petty dispute over a commission, and at the same time we could adopt a policy of preventing a wrongdoer from profiting by his wrong. Such a rule, however, does not profit the Appellant.

CONCLUSION

The foregoing considered, the Trial Court should be affirmed: the existing interpretation of interest defeats the Appellant, and his argument of policy does not appear to apply even if accepted.

ALBERT D. BRAULT
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Washington, D. C. 20036
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